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No. 91-1988

In The

# Supreme Court of the United States

October Term, 1991

FRANK LONGO,

*Petitioner,*

v.

UNITED STATES POSTAL SERVICE,
ALDEN VICTORIA, in his official capacity
as Postmaster of the Torrington Post Office,

*Respondents.*

## SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## STATEMENT

When Frank Longo filed his certiorari petition, the cases of International Society for Krishna Consciousness Inc. v. Lee, 112 S.Ct. 2701 (1992) and Lee v. International Society for Krishna Consciousness, 112 S.Ct. 2709 (1992) were still pending before this Court. Both have now been decided, and indeed the Postal Service relies upon the former in its Brief for the Respondents in Opposition. Pursuant to Rule 15.7 of the Rules of this Court, Mr. Longo respectfully submits this Supplemental Brief in order to discuss the applicability of the Lee decisions to this case.

## REASONS FOR GRANTING THE WRIT

The Postal Service appears to concede that the Second Circuit erred in characterizing the "no-campaigning" rule as content-neutral. Brief in Opposition 7. As the Postal Service recognizes, the

concession is compelled by this Court's later ruling in Burson v. Freeman, 112 S.Ct. 1846 (1992). The Postal Service nevertheless argues that the Second Circuit's error was harmless, because Lee establishes that post office sidewalks are nonpublic fora. Brief in Opposition at 7-8.

Lee's impact, however, is not as clear as the Postal Service supposes. Even assuming that the sidewalks are nonpublic fora - which itself is not a foregone conclusion[1] - it is questionable whether the no-campaigning rule can survive rational basis review. That standard of review, as applied in Lee, is by no means toothless. In sustaining the airport terminals' no-solicitation rule, for

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[1] See Pet. 23-25.

instance, the Court noted, as evidence of the rule's reasonableness, that solicitors had access to at least a portion of the premises - a portion, moreover, used by 97 per cent of the target audience. 112 S.Ct. at 2708-2709. The no-campaigning rule, in contrast, bars campaigning anywhere on post office property, and access from the surrounding municipal sidewalks is - as Mr. Longo has argued throughout this lawsuit - woefully incomplete and inadequate. And Justice O'Connor, whose vote was pivotal in both Lee decisions, found the no-solicitation rule reasonable because the record confirmed that solicitation had created serious congestion problems. 112 S.Ct. at 2713, 2714.[2] There is no evidence

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[2] Interestingly, she also explained Greer v. Spock, 424 U.S. 828 (1976) as resting upon the fact that the only materials that the base commander might

whatsoever that campaigning on post office property has ever contributed either to congestion, politicization, or public perception of politicization - the three concerns that the Postal Service asserts in the present litigation. Pet. 32.

In addition, Justice O'Connor joined Justices Kennedy, Souter, Blackmun and Stevens in pronouncing the terminals' no-leafletting rule invalid, even though she, unlike them, found the terminals to be nonpublic fora. Her reasons for doing so are, arguably, equally applicable here:

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disapprove were those that presented "'"a clear danger to [military] loyalty, discipline, or morale."'" 112 S.Ct. at 2714. Both she and Greer "'emphasized'" that the ban did not extend, as it does in Longo, to "'conventional political campaign literature." Id. If this factor was critical, in her view, to the reasonableness of a content-sensitive regulation at a military base, it should be all the more so at a postal facility.

the record revealed no harms "intrinsic to the act of leafletting" that might interfere with airport operations, 112 S.Ct. at 2714, and the government could readily promulgate regulations to contain whatever harms it professed to fear, id. at 2715.[3] Given the absence of any history of harm, and the ease with which any conjectural harms could be averted, campaigning in the instant case seems more

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[3] Justice O'Connor observed that regulations restricting expressive activities to specified portions of the airports were already in place and had functioned successfully during the many years that the lawsuit was in progress. 112 S.Ct. at 2715. The Postal Service likewise has regulations that prevent congestion, see 39 C.F.R. 232.1(e) and 39 C.F.R. 232.1(k)(2), cited in National Anti-Drug Coalition, Inc. v. Bolger, 737 F.2d 717, 723 n.5 (7th Cir. 1984); and it could easily craft regulations that would avoid the politicization problem. See PruneYard Shopping Center v. Robins, 447 U.S. 74, 87 (1980); McCreary v. Stone, 739 F.2d 716, 728 (2d Cir. 1984), aff'd by an equally divided Court, 471 U.S. 83 (1985).

closely akin to leafletting than to solicitation.

In sum, therefore, important issues do remain, even if post office sidewalks are nonpublic fora as the Postal Service contends.[4] These issues should be resolved either by this Court, or by the Second Circuit on remand. The Postal Service should not be allowed simply to declare victory and depart.[5]

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[4] If the sidewalks are traditional or designated public forums, the no-campaigning rule would presumably fail, inasmuch as it is directed at a "particular...form of speech," Kennedy, J., concurring in the judgment, 112 S.Ct. at 2722.

[5] Mr. Longo is puzzled by the Postal Service's insistence, Brief in Opposition 5, that this Court's plurality opinion in United States v. Kokinda, 110 S.Ct. 3115 (1990), erases the pre-existing conflict among the Circuits as to the forum status of post office sidewalks. It is settled law that, "when no single rationale commands a majority, 'the holding of the Court may be viewed as that position taken

## CONCLUSION

For the reasons set forth in the certiorari petition and in this Supplemental Brief, the petition should be granted, and the case should either be accepted for plenary review, or remanded for reconsideration in light of Burson and Lee.

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by those Members who concurred in the judgmen[t] on the narrowest grounds.'" City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 764 n.9 (1988), citing Marks v. United States, 430 U.S. 188, 193 (1977). Applying this principle to Kokinda, the "narrowest ground" for the judgment was expressed in Justice Kennedy's separate opinion, viz. that the no-solicitation rule at issue in that case was a valid time, place and manner regulation that could survive scrutiny in any forum. Thus, Kokinda, though it reversed the Fourth Circuit's judgment, did not reject that Circuit's finding that post office sidewalks are traditional public fora. That Lee may do so is a possibility. But that is one of the questions to be decided by this Court or on remand.

Respectfully submitted,

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